STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant

-vs-

CURTIS LEE HAMPTON

Defendant-Appellee.
_____/

Supreme Court No. _____

Court of Appeals No. 338418

Lower Court No. 15-1559 FC

MACOMB COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee
_____

STATE APPELLATE DEFENDER OFFICE
Attorney for Defendant-Appellant
_____

DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

STATE APPELLATE DEFENDER OFFICE

BY: Jason R. Eggert (P75452)
Assistant Defender
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

Table of Contents

Index of Authorities

Cases

Constitution, Statutes & Rules

Judgment Appealed from and Relief Sought

Curtis Lee Hampton Jr. appeals from an April 4, 2019 unpublished opinion of the Court of Appeals. (Appendix D to this Application). In the opinion, the Court of Appeals affirmed Mr. Hampton's convictions for first-degree felony murder, MCL 750.316(1)(b), first-degree child abuse, MCL 750.136b(2), and second-degree murder, MCL 750.317. The first-degree child abuse conviction served as the predicate felony for the felony-murder conviction. The Court also vacated one count of second-degree murder as his conviction for that count violated Double Jeopardy.

Mr. Hampton asks this Court to grant leave to address four issues. First, Mr. Hampton asks this Court to grant leave to address the Court of Appeals denial of his claim for a new trial based on the admission of hearsay statements from the decedent, Monique Rakowski, that Mr. Hampton was threatening her and their child and her belief that Mr. Hampton was going to kill her. In its opinion, the Court of Appeals denied relief based on its conclusion that Ms. Rakowski's statements that "I have to go now, [Hampton] is going to kill me" and her request for a "sanctuary" and to get help from police were not hearsay. The Court, relying on *People v Stewart*, 397 Mich 1, 9-10 (1976), concluded these statements were not hearsay because they were "non-assertive" because they were not capable of being true or false. Mr. Hampton, therefore, asks this Court to grant leave on this issue to clarify the difference between assertive and non-assertive statements to provide guidance to lower courts on this issue.

Second, Mr. Hampton asks this Court to grant leave to vacate his conviction for first-degree felony murder where a single stab wound was used as the act underlying both the predicate felony and the murder itself and to overturn *People v Magyar*, 250 Mich App 480 (2002). In *Magyar*, the Court of Appeals held that a single assaultive act constituting first-degree child abuse can serve as the predicate felony for a felony murder conviction related to the abused child.

Mr. Hampton submits that *Magyar* was wrongly decided and that the Legislature did not intend to elevate all murders of a child by his or her custodian to first-degree murder. This does not mean that the Legislature's addition of first-degree child-abuse as a felony-murder predicate felony is without effect. The child-abuse form of felony murder encompasses murders that culminate a course of abuse, as well as murders of someone other than the child-abuse victim. What the rule does not contemplate is use of a single stab wound as the act underlying both the predicate felony and the murder itself.

Third, Mr. Hampton asks this Court to grant leave or provide any other peremptory relief it deems appropriate because the trial court denied his right to a fair trial when it failed to give a voluntary manslaughter instruction where the facts established such and instruction should have been given.

Finally, Mr. Hampton asks this Court to grant leave because he was visibly shackled during his trial and, at least, one juror observed him in shackles.

Statement of Questions Presented

I. Did the trial court violate Mr. Hampton's right to Due Process by admitting the decedent's hearsay statements, where Mr. Hampton did not kill the decedent to prevent her from testifying and no other hearsay exception applied? Alternatively, was trial counsel ineffective for failing to object to the challenged statements?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

II. Was the evidence of felony murder insufficient because, when the Legislature made first-degree child abuse a predicate felony for purposes of the felony-murder rule, it did not intend to turn every impulsive murder of a child by her parent or custodian into first-degree murder?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

III. Did the trial court violate Mr. Hampton's right to Due Process when it denied his motion for a voluntary manslaughter instruction?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

IV. Were Mr. Hampton's Due Process rights under the Fifth and Fourteenth Amendment violated because he was improperly shackled at trial? Alternatively, was trial counsel ineffective for failing to object to Mr. Hampton's shackling?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

Statement of Facts

Overview

Curtis Lee Hampton Jr. was charged with first-degree premeditated murder (Count 1), felony murder (Count 2), attempted third-degree criminal sexual conduct (Count 3), felony murder (Count 4), and first-degree child abuse (Count 5). The charges arose from the deaths of his ex-girlfriend, Monique Rakowski ("Monique"), and their 13-month old daughter, Carmon. Counts 1-3 were connected to the death of Monique. In those counts, the prosecution alleged Mr. Hampton killed Monique under two separate theories: first, he killed her and it was premeditated; and second, that he killed her during the course of an attempted sexual assault. (T I 166-167).

Counts 4 and 5 were related to the death of Mr. Hampton's 13-month old daughter, Carmon. With respect to those charges, it was the prosecutor's theory that Mr. Hampton killed Carmon, who died of a single stab wound to the chest, while committing first-degree child abuse. (T I 167-168). The first-degree child abuse charges were based on that same act which led to Carmon's death, a single stab wound. (T I 167-168).

After a six-day jury trial in the Macomb County Circuit Court, the Hon. Jennifer M. Faunce presiding, Mr. Hampton was convicted of two counts of second-degree murder in connection with Monique's death and felony murder and first degree child abuse for Carmon's death. (T VI 8). The jury acquitted Mr. Hampton of the first-degree premeditated murder, felony murder, and attempted criminal sexual conduct. (T VI 8). Judge Faunce sentenced Mr. Hampton to concurrent terms of 415

to 624 months for each count of second-degree murder, 13-18 months for first-degree child abuse, and mandatory life without parole for felony murder. (ST 12-13).

Trial Testimony

Mr. Hampton met Monique Rakowski in 2012, when both of them were living in a trailer park in Sterling Heights. (T V 19). At the time, Mr. Hampton lived across the street from her. (T V 19). From approximately 2012-2014, the two had an "on and off" relationship and both saw other people. (T II 10, 19; T V 19, 23-25). Mr. Hampton and Monique also had a daughter together, Carmon, who was 13 months old at the time of the incident. (T II 10).

Monique and Mr. Hampton had a volatile relationship and were known as a couple with "problems." (T II 21-22, 64). The volatile nature of their relationship led to two incidents of domestic violence between them. (T II 21-22T V 25-27). One of these incidents led to a criminal conviction for Mr. Hampton and a no contact order. (T V 25-26). Monique, however, went to court with him to have that order lifted. (T V 26-27).

Monique was known to have a bad temper and issues with substance abuse. (T II 22, 27-28, 54-55; T III 141; T V 36). In order to address her mental health issues, Monique would self-medicate with marijuana, Adderall, and alcohol. (T II 22; T V 36). According to Mr. Hampton, Monique would regularly lose her temper and "would just blow up and say random things and go on and on about it." (T V 36). Monique's mother, Sharon Rakowski, also testified that she "drank a lot." (T II 22).

Due to the chaotic nature of their relationship, Monique's parents, Sharon and Michael Rakowski, did not approve of Mr. Hampton seeing their daughter. (T II 21). Mr. and Mrs. Rakowski were "pretty adamant" about the issue after Mr. Hampton "put her in the hospital." (T II 21). Ms. Rakowski also claimed that Mr. Hampton would get her back after fights because "[h]e always put the full court press on. He'd bring flowers, apologize, what ever, [sic] and . . . [s]he accepted him back." (T II 22).

The Rakowski's helped Monique with her day-to-day expenses, and other financial and living support. (T II 6-7). Their support including taking care of her 10-year-old son, Damien, who lived with her parents since he was about 5 years old, (T II 7-8, 23) and providing her with the home on Normandy Street in Eastpointe where she lived with Carmon. (T II 36).

In 2014, Monique moved to the house on Normandy Street. (T V 22). Mr. Hampton would stay there with her several times a week while the two were involved in a relationship. (T V 22). In December 2014, however, Monique left with her son and Carmon to go to Oklahoma. (T V 30). During her time in Oklahoma, Monique texted Mr. Hampton and threatened to not let him see Carmon anymore. (T V 32). Mr. Hampton believed that Monique thought he was trying to take sole custody of Carmon. (T V 32-33).

While there, Monique also married Nick VanLooven. Monique first met Mr. VanLooven in 2006. (T II 7). After reconnecting on Facebook, Monique resumed her relationship with Mr. VanLooven, who was living in Oklahoma, and, on December 8, 2014, they got married. (T II 8).

On December 21, 2014, Monique briefly returned from Oklahoma to attend her uncle's funeral. (T II 9). Prior to returning Oklahoma in late December 2014 or early January 2015, Monique went to her parent's house to watch Monday Night Football with her father. (T II 40). While watching the game, Mr. Rakowski claimed Monique abruptly told him she had to go back to Oklahoma because Mr. Hampton was "going to kill" her. (T II 40). No objection was made to the admission of this out of court statement.

Two other individuals, Timothy Brockway and Marc Witt, also testified as to statements made by Monique about her relationship with Mr. Hampton around the fall of 2014 and early 2015. Timothy Brockway knew Monique because she was his wife's best friend. (T II 61). Mr. Brockway knew Monique for about 5-6 years. (T II 62). Mr. Brockway knew Monique and Mr. Hampton as a couple and claimed they had "problems." (T II 64).

Mr. Brockway talked to Monique about every other day in January 2015. (T II 64-65). During this time, Mr. Brockway claimed Monique was "stressed" about her relationship with Mr. Hampton. (T II 66). In particular, Mr. Brockway testified that Monique asked him for "sanctuary" at his home and that she asked him to call his police officer friend "to help out in the situation" with Mr. Hampton. (T II 67). He claimed he called this police officer for her on February 8-9, 2015. (T II 67). Monique also gave him Mr. Hampton's name and a picture of him. (T II 68). Mr. Brockway never met Mr. Hampton in person. (T II 70).

Marc Witt, a friend of Monique's since 2011, also testified about his conversations with her about her relationship with Mr. Hampton. (T II 100). In the fall of 2014, Mr. Witt communicated via text message with Monique. (T II 101-102). After hearing of her death, he shared text messages from Monique with the Eastpointe Police Department "saying that CJ [Mr. Hampton] was threatening her and the baby." (T II 102). A screenshot of the text was displayed to the jury as Exhibit 36. (T II 103). The text read "Charles hasn't seen the - - fucking kid in 10 years and CJ [Mr. Hampton] threatened to kill me and the baby." (T II 103). He claimed he told her to "tell the authorities." (T II 103).

Mr. Witt characterized this text exchange as "some crazy, mad, baby mama drama." (T II 103). Mr. Witt also testified that Mr. Hampton was a "jealous boyfriend." (T II 104). Mr. Witt also never met Mr. Hampton in person. (T II 103-104). No objection was made to the admission of Monique's statements to Mr. Brockway or Mr. Witt.

In early January 2015, Monique once again returned to Michigan because Carmon had an infection in her lymph node that required surgical treatment and, as a result, she was hospitalized for seven to ten days. (T II 10). Shortly after Carmon was hospitalized, Monique contacted Mr. Hampton to tell him to come up to the hospital. (T II 11; T V 34). While Carmon was hospitalized, both Mr. Hampton and Monique were there "24/7." (T II 12). The two also discussed their previous dispute over custody and decided to put aside their differences. (T V 35). According to Ms. Rakowski, "They were very concerned. She was very sick." (T II 12).

After Carmon was discharged from the hospital, Monique took Carmon to her house on Normandy Street in Eastpointe. (T II 13). In the days prior to Monique and Carmon's deaths, Mr. Hampton was staying at the Normandy home everyday. (T V 43). While he stayed there, Mr. Hampton and Monique had sex on a daily basis, but did not have a title for their relationship. (T V 39).

Date of the Incident – February 11, 2015

On February 11, 2015, Mr. Hampton woke up in at the house on Normandy. (T V 44-45). He slept in the same bed with Monique and Carmon. (T V 45). He got up and made Carmon scrambled eggs and put a movie on for them. (T V 46). Monique joined them when she woke up. (T V 48).

Later that day, she went bowling with her mother. (T V 52). Monique brought Carmon with her. (T II 14). After the game, Monique left Carmon with Mr. Hampton and went to the hairdresser with Ms. Rakowski to get their "highlights done." (T II 14; T V 54). According to Ms. Rakowski, the appointment ended about 4:30 pm and that "[i]t took a lot longer at the hair place than we had anticipated and [Monique] was anxious to get home because she was afraid Curtis was going to be mad because it took so long." (T II 14-15). Monique left Ms. Rakowski's house at about 4:30 p.m. or 5:00 p.m. to head back to the house on Normandy. (T II 15).

Monique returned from her hair appointment around 6:00 p.m. (T V 55). Shortly after her arrival, the two began to discuss a letter Mr. Hampton received about child support and a bench warrant for his arrest. (T V 56). At the time, he had three separate orders for child support for his children. (T V 57). In addition, Mr.

Hampton was on probation from a domestic violence case where Monique was the complainant. (T II 32). The arrest warrant caused an argument between the two of them and she began to say that Mr. Hampton and his mother, who attempted to arrange payment for back child support, were "good for nothing." (T V 59). This discussion caused Mr. Hampton to get upset, so he went outside to smoke cigarettes and calm down. (T V 59-60).

After the argument, Monique, Mr. Hampton, and Carmon all watched a movie and Mr. Hampton and Carmon got take out for dinner. (T V 61). During the movie, Monique was drinking alcohol, smoking marijuana, and became intoxicated. (T V 62-63).

Later on, Monique and Carmon went to the bedroom to lie down in the bed. (T V 63). Eventually, Mr. Hampton went to the bedroom to go to sleep. (T V 65). While in the bedroom, Mr. Hampton asked if they could have sex one last time if he was going to jail. (T V 65). Monique declined. (T V 65). Mr. Hampton then started talking to her about his warrant and Monique began to get angry, "snapped on" him, and started hitting him. (T V 68). Mr. Hampton testified Monique then pulled a knife from under her pillow and started swinging it at him, hitting him on the left side of his chest. (T V 69). Monique tried to stab him again, but her hair was in her eyes and she missed Mr. Hampton and stabbed Carmon in the chest. (T V 70).

Upon seeing his daughter get stabbed, Mr. Hampton "lost it." (T V 71). He then chased her and tried to grab the knives out of her hands. (T V 71). While trying to get

the knives from her they went from the bedroom, to the hallway, and eventually to the bathroom. (T V 72).

Once he got the knives, Mr. Hampton "blacked out" and stabbed Monique between 14-16 times. (T V 72). Monique fell on the bathroom floor. Mr. Hampton was "very emotional" and tried to help her by moving her in an upright position. (T V 74-75). Shortly thereafter, Monique passed away. (T V 75).

Mr. Hampton then went to the bedroom because he could hear Carmon wheezing. (T V 76). Carmon was lying on the bed and covered in a blanket. (T V 77). Mr. Hampton picked her up and noticed she was bleeding and not breathing. (T V 78). He testified he attempted CPR, but was unsuccessful. (T V 78-79).

After Monique and Carmon died, Mr. Hampton "lost it" and tried to drown himself in the tub. (T V 79-81). Mr. Hampton then went back to the bedroom, brought Carmon to the bathroom, and set her on top of Monique, so they could all be together for the last time. (T V 82-83). Mr. Hampton also placed nickels that had fallen out of Monique's pockets over her eyes because it was something characters from her favorite movie, Boondock Saints, did. (T V 86-88). He also put a pacifier in Carmon's mouth. (T V 85). Mr. Hampton attempted to drown himself again but was unsuccessful. (T V 88-89).

Mr. Hampton then dried himself off and put his clothes back on. (T V 90). He testified he passed out numerous times in the bedroom, before going to the store to get a Black and Mild cigar. (T V 91). When he returned, he smoked the cigar in the house and thought about stabbing himself in the chest. (T V 93). Mr. Hampton passed

out again, woke back up and stabbed the mattress. (T V 94-95). He also looked through Monique's phone and found pictures of Monique and Nick's marriage license. (T V 94-95). Mr. Hampton eventually left the Normandy house around 3:00 pm on February 12, 2015. (T V 99).

After the Incident – February 12, 2015 – February 13, 2015

On the evening of February 11, 2015, Monique's mother began to become concerned about her because she was not answering her calls or texts. That evening, at about 7:00 p.m., Ms. Rakowski attempted to contact Monique to make a plan about Damien's baseball game the next day. (T II 15). During this time, Damien was staying with Ms. Rakowski and her husband and Monique would "come every morning and get Damien off for school." (T II 15). Monique, however, did not answer her phone. (T II 15).

The following morning, February 12, 2015, Monique did not come to pick up Damien. (T II 15). Ms. Rakowski explained that Monique had a follow-up appointment for Carmon with surgery and "assumed that she just ran out of time because with getting the baby ready and stuff she'd run out of time." (T II 15-16). Ms. Rakowski testified, however, that Monique would usually call to inform her if she could not pick up Damien. (T II 16). As a result, Ms. Rakowski texted Monique to see if she was taking Carmon to the doctor and, if so, how the appointment went. (T II 16). Monique did not respond. (T II 16).

Monique also did come to pick up Damien from school in the afternoon. (T II 16-17). According to Ms. Rakowski, Monique "was always there" because Damien

participated in a travel baseball team and they were not able to arrange transportation because Ms. Rakowski and her husband could not keep up with the travel. (T II 16-17). After finding out that she did not show up for practice, Ms. Rakowski "knew something bad was wrong because she would never have missed that practice." (T II 17). Later that evening, around 5:00 p.m., Ms. Rakowski called her husband to have him take Damien to practice and to check on Monique "because it [wasn't] like her not to come to practice." (T II 17, 42-43).

After he got out of work, at about 7:00 p.m., Mr. Rakowski went to the house on Normandy Street to see if Monique was there. (T II 43-44). When he arrived at the home, Mr. Rakowski thought it looked like no one was home because Monique's car, a blue Impala, was not there. (T II 43-44). To be sure, Mr. Rakowski knocked on the front door, which was locked, and no one answered. Mr. Rakowski, however, could hear a puppy barking and whining on the inside. (T II 44). After trying the front door, Mr. Rakowski had to go home to get a key for the house because he did not have a key to the house with him. (T II 45). He then went back to the house around 8:30 p.m. and was able to let himself in through the side door of the home. (T II 45).

Upon entering the home, Mr. Rakowski let the puppy out of its crate and took her outside because she peed on the floor when she got out and fed her. (T II 45-46). Mr. Rakowski also called out "anybody here, Monique" when he got in the home, but no one answered. He then began going through the house, including the basement and upstairs portion of the home, to see if anyone was there. (T II 46). After looking

through the home, Mr. Rakowski "could see the light was on in the bathroom but the door was locked from the inside." (T II 46).

Mr. Rakowski forced the bathroom door open and found Monique and Carmon lying on the floor. (T II 48). Mr. Rakowski, who's a nurse anesthetist, knew both of them were probably dead, but checked their vitals to confirm and found no pulse. (T II 48-49). Mr. Rakowski also attempted to resuscitate Carmon, but was unable to get a response. (T II 48). After attempting to render emergency aid, he called 911 because he knew he "shouldn't touch anything else." (T II 49). He then stayed at the residence until the officers arrived and answered their questions. (T II 49).

Officer Nicholas Hofer and Officer Fortunado responded to Mr. Rakowski's 911 call. (T II 77). When they arrived, Mr. Rakowski informed him them was unable to contact Monique all day, came to check on her, and found her and his granddaughter Carmon on deceased on the bathroom floor. (T II 78). After hearing this, the officers, went to the bathroom and saw Carmon lying on top of Monique. (T II 78-79). Both of them were on their backs and were deceased. (T II 79). A firefighter also confirmed their deaths. (T II 80)

Detective Alexander Holish served as the evidence technician and processed the scene. (T II 82). He photographed the home and looked for evidence, such as fingerprints and blood stains. (T II 82). He could not find any obvious blood around the house even though there was a stabbing. (T II 90).

Detective Holish also noticed a Boondock Saints poster was in the living room. Detective Holish recognized the movie and knew the two main characters would kill

people and put coins over their eyes. (T II 91). According to Detective Holish, putting coins on eyes was a Greek tradition "so deceased will have money to pay to their gatekeeper of the after life. And once money is paid, gatekeeper will take them on a boat across this mythological river into the after life." (T II 91). He found this to be significant because Monique was found with coins over her eyes. (T II 84-85).

Medical examiner Dr. Mary Pietrangelo arrived at the Normandy house at about midnight. (T III 8-9). She went to the bathroom to observe the bodies and found Monique lying on her back on the bathroom floor with Carmon lying on top of her on a pillow. (T III 11). Dr. Pietrangelo then picked up Carmon and took her to the living room couch to observe her because she saw a "little stain on her pajamas." (T III 12). After removing the onesie, she saw a wound on her chest. (T III 12). Dr. Pietrangelo did not observe much blood on Carmon or around the house. (T III 14).

Dr. Piertrangelo then evaluated Monique. She observed two nickels, one on each eye, and began to remove her clothes to assess her wounds. (T III 17). She then had the bodies transported to the examiner's office. (T III 15). Once back at the examiner's office, Dr. Piertrangelo performed the autopsy on Monique. (T III 20). During the examination, she located 13 stab wounds to the trunk, one stab wound to the right arm, and a few "incised wounds on the fingers." (T III 23-24). She concluded the cause of death was multiple stab wounds and the manner of death was homicide. (T III 28). She found no physical signs of sexual assault. (T III 29). Dr. Piertrangelo also found positive findings for alcohol .101 (T III 30), marijuana (T III 32), and amphetamines. (T III 34).

Medical examiner Dr. Daniel Spitz performed the autopsy on Carmon. (T III 44-45). He concluded that the cause of death was a single stab wound to the chest with perforation of the heart and lung and the manner of death was homicide. (T III 58).

Mr. Hampton's Actions After Monique and Carmon's Death

- *Mr. Hampton Visits His Mother*

After leaving the house on Normandy, Mr. Hampton met his mother, Anita Hampton, in the parking lot of her apartment in Warren. (T III 69). Mr. Hampton lived with his mother "off and on" during the 10 years she lived in those apartments. (T III 70). Ms. Hampton testified that, while Carmon was in the hospital, Mr. Hampton did not stay with her. (T III 72). Mr. Hampton, to Ms. Hampton's knowledge, stayed with Monique during and after the procedure. (T III 72). She understood that he was staying there because she stopped by the residence after work to drop off food for him and he was there. (T III 73).

On the afternoon of February 11, 2015, Mr. Hampton met her in the parking lot of the apartment building and told her he "wasn't going to see [her] for a while." (T III 81). He also gave her a bag with some belongings in it. (T III 83).

The Eastpointe PD came to her house on February 12, 2015 at about 3:00 am. (T III 74). When the police arrived, she thought it was because of a probation violation. (T III 76). The officers informed her they were looking for Mr. Hampton and she informed them she had saw him the previous afternoon and she tried to call him, but was unable to get through to him. (T III 78-80).

On February 16, 2015, Ms. Hampton delivered the phone she let Mr. Hampton use to the Eastpointe Police Department. (T II 88). Then, on February 19, 2015, she turned over the bag to police officers who came to her residence to collect evidence. (T III 88-89). At this point, she informed them of her contact with Mr. Hampton in the parking lot and shared a text she received from Mr. Hampton on February 12, 2015:

> Make sure you get all of my stuff, it's yours to do with as you please. I sorry, life is too hard and I can't give you my troubles anymore. I love you. The past word [sic] for my phone is CJS 9353. The past code [sic] to Monique phone is 9353. And when the safety lock screen on my phone pops up it's a seven, but you have to draw it, period. Let everyone know - - let everyone and my phone know what happened to me please. I will love and miss you. All the doors are locked but Monique's parents have keys and they have to break the back doors window out to get the screen door open. Just have them, they break out a window and come inside. I'm gone. Last you will hear from me. Love you, your son, CJ. (T III 92).

***

> P.S. I wanted not to be replaced anymore. Just have something for the rest of my life with Monique and my baby but always had other plans and made snap and go crazy. Sorry. Love you. Goodbye. This the hardest thing I had to do that I didn't not want to do - - that I didn't want to. I feel I was made to do this. (T III 93)

These messages were sent on February 12, 2015 at approximately 2:00 am. (T III 112). Ms. Hampton's phone was then taken as evidence. (T IV 21).

- *Mr. Hampton Visits Davonne Phillips*

After meeting his mother in the afternoon, Mr. Hampton went to see his cousin, Davonne Phillips, in Detroit. (T III 121-122). Earlier that day, he texted Mr. Phillips to say he was coming over. (T III 122). Mr. Phillips did not know how he got there when he arrived at the house because Mr. Hampton did not own a car and Mr. Hampton informed him that his mother dropped him off. (T III 122-123). He learned

later, however, that Mr. Hampton used Monique's car to get to his house when the police impounded it. (T III 123).

During their visit, the had a couple of drinks and everything seemed normal until Mr. Hampton started mumbling to himself that "it was messed up" and unzipped his jacked revealing a knife stuck in his chest. (T III 124). Mr. Hampton told Mr. Phillips that Monique got mad and stabbed him while they were lying in bed and he tried to make love to her "one last time." (T III 126). He also said Monique swung the knife at him and "she missed him and hit the baby." (T III 126, 134). After this happened, Mr. Hampton told him he "lost it." (T III 130). After this discussion, he took Mr. Hampton to Brianna Keinath's house in Detroit. (T III 127).

- *Mr. Hampton's Visit with Brianna Keinath*

Mr. Hampton was dropped off at Ms. Keinath's house at approximately 8:00 p.m. and it was her understanding that he was visiting because "he needed someone to calm him down." (T III 158). When she saw Mr. Hampton she knew something was wrong because he seemed agitated. (T III 158). She also noticed that there was blood all over his chest and a knife in his chest when he took his jacket off. (T III 159). Ms. Keinath asked him what was going on and he informed her he had a fight with Monique and she stabbed him. (T III 161, 170). Mr. Hampton, who had a "friends with benefits" arrangement with Ms. Keinath, also asked her why they did not work out as a couple. (T III 162).

Mr. Hampton was at her house about 3-4 hours until Mr. Phillips returned to pick her up. (T III 163). Mr. Hampton used her phone to call Mr. Phillips and Ms.

Keinath believed he deleted all of the texts and call history from her phone. (T III 163). Mr. Hampton left because Ms. Keinath informed her he was not allowed to stay. (T III 164). Hours later, at about 2:47 am, she received a text from Mr. Hampton's phone which read "CJ has passed. I'm just texting everyone out of his phone to let them know. Call me later for more details." (T III 165).

After Mr. Phillips picked him up, he informed Mr. Hampton he could not stay at his place because of what happened. (T III 130).

- *Mr. Hampton Turns Himself in at Dearborn Police Department*

On the morning of February 13, 2015, Gregory Jones, Mr. Hampton's brother-in-law, was returning from work and had started to receive calls about something happening to Carmon. (T III 178). On his way home, he saw Mr. Hampton walking about 3 blocks from his home near Warren and Southfield in Detroit. Mr. Jones had Mr. Hampton get in his car. (T III 181).

Once in the car, Mr. Hampton told him he "wanted to kill himself and he wanted me to kill him." (T III 181). Mr. Jones was "shocked" by this statement and said he would not do it. Mr. Hampton also asked for one of Mr. Jones' guns so he could kill himself. (T III 181). Mr. Jones then called his mother and had her talk to Mr. Hampton. (T III 182). While on the phone, Mr. Hampton also expressed a desire to commit suicide. (T III 183).

Mr. Jones then took Mr. Hampton to the Dearborn Police Department. (T III 184-185). While there, Mr. Jones was able to get some police officers to come out to the vehicle and Mr. Hampton turned himself in. (T III 185).

Sergeant Sergio Popescu, of the Dearborn Police Department, came into contact with Mr. Hampton when he turned himself in "for a possible homicide" at the Dearborn Police Department. (T IV 49-50). According to Sergeant Popescu, Mr. Hampton told him he was stabbed by "his girlfriend" Monique while they were laying in bed with their baby, Carmon and, after telling Monique he violated probation and was going back to jail, told her he wanted to have sex with her "one last time." (T IV 51-52). He also told Sergeant Popescu that Monique was "very mentally unstable and extremely abusive," carried knifes all the time, and pulled a knife and tried to stab him. (T IV 52). Monique, however, missed and stabbed Carmon in the chest while she was lying on the bed. (T IV 52). Mr. Hampton then claimed he was repeatedly struck in the chest and that she stabbed him so hard in the chest "that the knife actually stuck in his chest." (T IV 53).

While on the gurney at the hospital, Mr. Hampton told Sergeant Popescu that Monique was "extremely abusive," addicted to Percocet, "a heavy marijuana smoker," and that he asked her repeatedly to see a therapist or counselor, but she refused. (T IV 55). Mr. Hampton also discussed his relationships with other women and his children. (T IV 57). Specifically, he mentioned encouraging another woman to have an abortion. (T IV 57).

Dr. Jonathan Leischner treated Mr. Hampton at the hospital and testified that Mr. Hampton had "two one-centimeter lacerations that appeared superficial to his left chest wall." (T IV 36). He also testified that the wounds were about "[h]alf a centimeter" deep, were about a day old, and, as a result, had already begun healing.

(T IV 37). The treatment involved the application of Bacitracin, an antibiotic ointment, two Band-Aids, and did not require stitches. (T IV 37). In total, Mr. Hampton was in the hospital for about an hour and a half. (T IV 37). Finally, he testified that, based on these wounds, the four-inch blade that was recovered from Mr. Hampton could not have been buried into his chest up to the handle. (T IV 38).

- *Interview with Detective Joseph Madonia – February 13, 2015*

Detective Madonia was the officer in charge of this investigation and questioned Mr. Hampton about what happened on February 11, 2015 (T IV 72). At about 3:00 p.m., Detective Madonia placed Mr. Hampton in a holding cell and set up the interview room to be audio and video recorded. (T IV 114). He then gave Mr. Hampton *Miranda* warnings and he agreed to speak with him. (T IV 116). The interview took about 3 hours. (T IV 117).

Detective Madonia testified it was "hard" to get Mr. Hampton to talk about the incident. (T IV 125). However, Mr. Hampton placed himself in the home at the time of the incident with both Carmon and Monique. (T IV 127).

According to Detective Madonia, Mr. Hampton told him he got into an argument with Monique about going back to jail. (T IV 122). Mr. Hampton was on probation for domestic violence charge in which Monique was the complainant. (T IV 122-123). Mr. Hampton told him that he, Monique and Carmon were in the living room watching TV when Monique decided it was time to go to bed and grabbed Carmon to go into the bedroom. (T IV 127).

In the bedroom, Mr. Hampton told Detective Madonia that he had a discussion with Monique about the possibility of going to jail because of his probation and he

"tried to get close with her and cuddle with her in bed and she refused, kind of kicked, kicked him away so as not to cuddle with her." (T IV 128). Mr. Hampton denied trying to have intercourse with Monique. (T IV 128). At this point in time, Mr. Hampton said Monique grabbed a knife and tried to stab him, but missed and stabbed Carmon. (T IV 138-139). This made him snap and caused the two of them to get into a fight, which started in the bedroom, spilled into the hallway and ended in the bedroom. (T IV 139-142; 159).

During the struggle, Mr. Hampton said he was able to get the knife used to stab Carmon away from Monique, but that she pulled a different knife out of her pocket. Mr. Hampton was also able to get that knife, so he was then armed with two knives, one in each hand. (T IV 143). Mr. Hampton then said "his eyes were closed and he made stabbing motions" while they were "face-to-face." (T IV 147). He also told Detective Madonia that he and Monique had a conversation in the bathroom and "he watched her die." (T IV 147). According to Detective Madonia, "she asked him to help her, get some sort of help, fix this, make it right." (T IV 148). Mr. Hampton said he did not call 911 because "[h]e knew he already was going to jail." (T IV 149). According to Mr. Hampton, it took 30 minutes for Monique to die. (T IV 149). Prior to dying, however, Mr. Hampton said Monique stabbed him in the chest and he grabbed this third knife and stabbed her chest after she was dead. (T IV 156). After she died, he placed coins over her eyes. (T IV 152).

Mr. Hampton also heard some gurgling in the bedroom and, at that point, he went back there to check on Carmon. (T IV 149). Mr. Hampton also claimed he attempted to perform CPR, but was unsuccessful. (T IV 150).

After these incidents, Mr. Hampton told Detective Madonia he attempted to drown himself in the bathtub twice. (T IV 151). Mr. Hampton called himself a coward for failing to commit suicide. (T IV 152). He got out of the tub, dried himself off, got dressed, went to the store to get cigars and came back to the house. (T IV 152). He claimed he took the knife Monique stabbed him with out of his chest and put it back in after returning from the store. (T IV 153). Mr. Hampton also admitted to cleaning up blood at the house. (T IV 141). He flushed the wipes and paper towel he used to clean up down the toilet. (T IV 141).

Mr. Hampton told Detective Madonia that he missed Monique and Carmon. (T IV 130). Mr. Hampton also told him "the hardest thing he ever had to do was hurt somebody he loved and that she shouldn't have been there." (T IV 130). Mr. Hampton told him there were "many different ways" he could have calmed down and did something different that maybe could have stopped instead of doing what he did." (T IV 134). Detective Madonia also claimed that he asked several questions about what happened to Carmon, but that Mr. Hampton did not answer his questions directly. (T IV 135).

Additional Investigation by Law Enforcement

Deputy Joseph Bosek, an evidence technician from the Macomb County Sheriff's Department, assisted with the application of "Bluestar" at the Normandy

house. According to Deputy Bosek, Bluestar is "a chemical reagent whose purpose is to detect blood stains that have been washed out, wiped up or invisible to the naked eye." (T II 112). The chemical works by spraying it on areas and illuminating if there's a "positive reaction." (T II 112-113). Bluestar can react to blood, household chemicals, detergents, iron, and copper. (T II 115). Deputy Bosek claimed the more "blue-ish reaction is more blood" and "a white-ish one will be more like probably false positive." (T II 116).

According to Deputy Bosek, there were positive reactions on the mattress (T II 115), the floor next to the mattress (T II 115), the master bedroom door, (T II 122-125), the bathtub, (T II 145), and the area near the entrance to the bathroom. (T II 129). Where there were no prior visible signs of blood and there was a positive reaction, Deputy Bosek opined that "[i]t was either cleaned up or just invisible to the naked eye." (T II 132). Deputy Bosek also saw blood in the bathroom and on the floor right outside of the bathroom. (T II 117-118).

Jodie Corsi, of the Michigan State Police Crime Lab, tested swabs collected by Deputy Bosek while performing Bluestar test, (T II 156), including knives, items of clothing, and a sheet. (T II 159). Two knives tested positive for blood and the third did not. (T II 160). All of the clothing that was tested was positive for blood. (T II 163). In addition, swabs from a door handle (T II 165), the bathroom door handle (T II 166), hallway molding (T II 166), the bedroom door handle and hallway (T II 167), and other areas of the home. After testing these items she sent them out for DNA testing. (T II 168-169)

Amanda Fazi, a DNA specialist at the Michigan State Police Crime Laboratory, performed tests on 11 items and three reference samples, Mr. Hampton, Monique, and Carmon. (T II 185). The DNA profile on the knife handle was consistent with Mr. Hampton, the blade of the folding knife had a DNA profile consistent with Monique, the swab of the handle of the folding knife had a profile consistent with Mr. Hampton, the fitted sheet tested positive for Monique and a second stain on the sheet tested positive for Monique, as a major contributor, and Mr. Hampton, as a minor contributor, the inside bedroom door handle was positive for Mr. Hampton, the hallway molding tested consistent with Monique, the west bedroom wall was consistent with Mr. Hampton. (T II 189-199).

Shackling of Mr. Hampton at Trial

Mr. Hampton was in leg shackles throughout the course of his trial. (T V 15-16, 108). Prior to Mr. Hampton's testimony, the issue of shackling was addressed by the trial court. (T V 15-16). During this exchange, Mr. Hampton's trial attorney, Azhar Sheikh, conducted an inspection of the area around the witness stand from the jury box to see if the leg shackles were visible. (T V 15-16). After this inspection, Mr. Sheikh stated he no objection to the presentation. (T V 15-16).

On January 17, 2018, Julianne Cuneo, the Chief Investigator with the State Appellate Defender Office, spoke with Mr. Sheikh regarding the issue of shackling. During the conversation, Mr. Sheikh confirmed that Mr. Hampton was shackled "throughout trial." He said he believed that the jurors were not able to see the

shackles due to skirting around the defense table and because care was taken in bringing Mr. Hampton into and out of the court room. (Appendix A – Offer of Proof).

Since the filing of the Brief on Appeal, counsel continued to investigate and obtained more information about the shackling of Mr. Hampton at his trial. In particular, counsel discovered that at least two of the jurors at Mr. Hampton's trial observed him wearing leg shackles during the course of the trial. (See Appendix B – Juror Postcards). One juror observed Mr. Hampton in shackles while he was seated at counsel table and the other observed him wearing shackles when he testified. (Appendix B – Juror Postcards).

A motion to remand was filed to further develop the record on this issue. On August 1, 2018, this Court entered an order granting the motion to remand and ordered the trial court to hold an evidentiary hearing on Mr. Hampton's claim. *People v Hampton*, No. 338418, unpublished order of the Court of Appeals (August 1, 2018).

Evidentiary Hearing

On November 20, 2018, an evidentiary hearing was held. Both jurors who responded they observed Mr. Hampton in shackles and Mr. Hampton's trial attorney, Azhar Sheikh, testified at the hearing. The first juror who testified at the hearing, Jason Moscone, testified he did not see Mr. Hampton in shackles at trial even though he previously indicated he observed Mr. Hampton in shackles while he was sitting at counsel table. (EH 8).[1] Instead, he claimed he mistakenly indicated he saw the shackles on the postcard. (EH 6).

[1] "EH" refers to the transcript of the evidentiary hearing held on November 20, 2018.

The second juror, Anthony Benicasa, testified he observed Mr. Hampton in shackles as the deputies brought him into the courtroom. (EH 12). He explained that when he saw him in shackles that he figured Mr. Hampton was shackled because he was a prisoner and it was done to keep him secure. (EH 13). Mr. Benicasa testified seeing him in shackles did not impact his view of the evidence. (EH 12-14). Later, Mr. Benicasa clarified he observed Mr. Hampton in shackles when he stood up at counsel table. (EH 18-19).

Mr. Sheikh testified he did not object to the shackling of Mr. Hampton at trial because of the nature of the offense he was charged with, which involved allegedly stabbing two individuals to death, and because of his belief the jurors would not be able to see them. (EH 26). He based this conclusion on his experience practicing in Macomb County and the precautions, such as skirting or boarding at counsel table, that were taken to prevent jurors from seeing shackles. (EH 26-28). He testified those precautions were taken in this case. (EH 26-28). Mr. Sheikh further testified he thought Mr. Benicasa was mistaken when he testified he observed Mr. Hampton in shackles during trial. (EH 28).

On cross-examination, Mr. Sheikh also explained he did not file a motion due to allegations he had knifes in his cell at the Macomb County Jail. (EH 30). Based on this, he believed any objection would be futile. (EH 30).

Trial Court Order Denying Motion for New Trial

On December 10, 2018, the trial court entered an order denying Mr. Hampton's motion for new trial. (Appendix C – Trial Court Order). In particular, the trial court

concluded Mr. Hampton was (1) properly shackled at trial due to the nature of the allegations against him and the precautions taken to obscure the shackles from the jury's view; (2) there was no prejudice resulting from Mr. Hampton's shackling at trial; and, as a result, (3) Mr. Hampton's rights to Due Process and effective assistance of counsel were not violated.

I. The trial court violated Mr. Hampton's right to Due Process by admitting the decedent's hearsay statements, where Mr. Hampton did not kill the decedent to prevent her from testifying and no other hearsay exception applied. Alternatively, trial counsel was ineffective for failing to object to the challenged statements.

Issue Preservation and Standard of Review

Counsel failed to object to the challenged statements. This issue was unpreserved. Unpreserved constitutional issues are reviewed for plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 763, 774, 597 NW2d 130 (1999).

Alternatively, Mr. Hampton submits that trial counsel's failure to object to the challenged statements constituted ineffective assistance of counsel. The performance and prejudice prongs of an ineffective assistance of counsel claim are mixed questions of law and fact reviewed de novo. *Strickland v Washington*, 466 US 668, 698; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Trakhtenberg*, 493 Mich 38, 47 (2012). Where, as here, the existing record is clear and adequate with regard to the ineffective assistance claim, an evidentiary hearing on the matter is not required. *People v Ullah*, 216 Mich App 669, 684; 550 NW2d 568 (1996).

Discussion

A. The trial court violated Mr. Hampton's right to Due Process and committed plain error when it allowed the admission of Monique Rakowski's hearsay statements

Both the due process guarantees of the Michigan and United States constitutions require fundamental fairness in the use of evidence against a criminal defendant. Const 1963, art 1, § 17; US Const, Am XIV. See generally, *Lisenba v*

California, 314 US 219; 62 S Ct 280; 86 L Ed 166 (1941). While the court is an impartial arbiter rather than advocate, the court nonetheless has a duty to correct errors that threaten to impact significantly those guarantees, even if the advocates fail to properly object at trial. See generally, *Carines*, supra.[2]

The trial court committed plain error when it admitted Monique Rakowski's hearsay statements through the testimony of Michael Rakowski, Timothy Brockman, and Marc Witt. Each of these witnesses were allowed to testify at length about statements made by Monique, even though she was unavailable to testify and no hearsay exception applied. The court's failure to exclude this testimony, despite its obvious inadmissibility, constitutes plain error.

Here, because Monique died and was unavailable, see MRE 804(4)(declarant "unable to be present or testify at the hearing because of death"), her statements are only admissible if they fit within one of the exceptions set forth in MRE 804(b). MRE 804(b) provides, in relevant part,[3] that the following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

> (2) *Statement Under Belief of Impending Death*. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

---

[2] In the present case, the statements at issue were made to friends or relatives, not to police officers conducting an investigation, so Appellant's Sixth Amendment Confrontation Clause rights are not involved. See generally, *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

[3] Some of the exceptions to the hearsay rule are clearly not applicable under the facts of this case. For example, Monique did not testify at a prior proceeding, see MRE 804(b)(1), the statements did not involve a statement against her interest, see MRE 804(b)(3), did not concern her family history, see MRE 804(b)(4), and her statements were not made in a deposition. See MRE 804(b)(5)

> ***
>
> (6) *Statement by Declarant Made Unavailable by Opponent*. A statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.
>
> (7) *Other Exceptions*. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

An examination of Monique's hearsay statements plainly demonstrates that none of these exceptions apply.

Monique's father, Michael Rakowski, testified that, prior to returning Oklahoma in late December 2014 or early January 2015, Monique came over to watch Monday Night Football with him. (T II 40). While watching the game, Mr. Rakowski claimed Monique told him she had to go back to Oklahoma because Mr. Hampton was "going to kill" her. (T II 40).

In addition to her father, two other individuals, Timothy Brockway and Marc Witt, also testified as to statements made by Monique about her relationship with Mr. Hampton around the fall of 2014 and early 2015. Both witnesses were called for the sole purpose of admitting those statements. Through Mr. Brockway the

prosecution was able to admit Monique's statements that, during this time, she was "stressed" about her relationship with Mr. Hampton, (T II 66), she asked him for "sanctuary" at his home and that she asked him to call his police officer friend "to help out in the situation" with Mr. Hampton. (T II 67).

The prosecution also called Marc Witt, a friend of Monique's, to testify about his conversations with her about her relationship with Mr. Hampton. (T II 100). In particular, he testified about text messages he exchanged with Monique in the fall of 2014. (T II 101-102).[4] The text read "Charles hasn't seen the - - fucking kid in 10 years and CJ [Mr. Hampton] threatened to kill me and the baby." (T II 103). He claimed he told her to "tell the authorities." (T II 103). Mr. Witt characterized this text exchange as "some crazy, mad, baby mama drama." No objection was made to the admission of Monique's statements to her father, Mr. Brockway or Mr. Witt.

First, Monique's statements, although concerning her believes about Mr. Hampton allegedly threatening to kill her and Carmon in the future, are not dying declarations. See MRE 804(b)(2). This is so because her statements were not made under the belief of impending death and did not relate to the circumstances of her killing. See *People v Parney*, 98 Mich App 571, 581 (1979)[5]; *People v Stamper*, 480 Mich 1, 4 (2007)(the circumstances surrounding the statement must "clearly

[4] A screenshot of the text was displayed to the jury as Exhibit 36. (T II 103).

[5] In order to be admissible as a dying declaration, a statement must meet four requirements: (1) the declarant must have been conscious of impending death; (2) death must have actually ensued; (3) the statements are sought to be admitted in a criminal prosecution against the individual how killed the decedent; and (4) the statements must relate to the circumstances of the killing. *Parney*, 98 Mich App at 581.

establish that the declarant was *in extremis* and believed that his death was impending, the court may admit statements concerning the cause or circumstances of the declarant's impending death as substantive evidence under MRE 804(b)(2).”). Instead, these statements were mostly made at least a month prior to the circumstances which led to her death.

Second, the statements are not admissible under the forfeiture by wrongdoing exception. See MRE 804(b)(6). In order for this rule to apply, “the defendant must have specifically intended his wrongdoing to render the witness unavailable to testify.” *People v Roscoe*, 303 Mich App 633, 640 (2014), citing *People v Burns*, 494 Mich 104, 111-113 (2013). Such evidence is completely absent in this case and, as a result, it cannot be applied to allow the admission of Monique’s hearsay statements.

Finally, Monique’s statements are not otherwise admissible under MRE 804(b)(7) because there was no finding of “trustworthiness” by the trial court and, “[w]ithout such a finding, the statements are ‘presumptively unreliable and unconstutional.’” *People v Smith*, 243 Mich App 657 (2000), citing *Idaho v Wright*, 497 US 805, 818 (1990). The admission of these statements, therefore, was error.

The admission of Monique’s hearsay statements rendered Mr. Hampton’s trial fundamentally unfair and seriously affected the fairness, and integrity of the judicial proceedings. See *Carines*, supra. Indeed, Monique’s statements, which were presented without qualification for their truth, supplied the jury with information that Mr. Hampton planned to kill Monique and his daughter, Carmon, prior to the date of their deaths. This was the only evidence presented to the jury that Mr.

Hampton intended to harm Carmon. (See T II 103)("CJ [Mr. Hampton] threatened to kill me and the baby."). Without these hearsay statements, there was absolutely no evidence presented to the jury that Mr. Hampton had intended any harm to his daughter or allegedly threatened Monique and Carmon's lives. Under these circumstances, the error was plain and a new trial is required.

B. Alternatively, trial counsel was ineffective for failing to object to the challenged statements

In the alternative, trial counsel was ineffective for failing to object to the admission of Monique's hearsay statements during trial. A defendant has the right under the federal and state constitutions to the effective assistance of counsel. US Const., amend VI; Const. 1963, Art. 1, § 20; *Strickland*, supra at 668. To prevail on an ineffective assistance of counsel claim, a defendant must meet two criteria. He must first show that counsel's performance was deficient. This requires showing that counsel made errors so serious that he was not performing as the counsel guaranteed by the Sixth Amendment. *Strickland*, supra at 687. Second, the defendant must show the deficient performance was prejudicial. *Id.* at 687. Prejudice is established where there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694; *People v Armstrong*, 490 Mich 281, 289-290 (2011).

Knowledge of the law applicable to the defendant's case is of course essential to a rendering of effective assistance. *People v Carrick*, 220 Mich App 17, 22. In several cases, the failure to object to the admission of hearsay evidence has required reversal based on ineffective assistance of counsel. See *People v White*, 142 Mich App

581 (1985), overruled on other grounds in *People v Pickens*, 446 Mich 298 (1994); *People v Fenner*, 136 Mich App 45; 356 NW2d 1 (1984)

There is a reasonable probability that the result of the proceedings would have been different had defense counsel objected. Here, as discussed above, Monique Rakowski's hearsay statements were clearly inadmissible and no exception to the hearsay rule applied. Counsel's failure to recognize and invoke the simple and straightforward rules of evidence was unreasonable, particularly where there was no conceivable tactical or strategic basis not to object to the improper admission of this highly prejudicial and inadmissible evidence. Counsel, therefore, rendered prejudicially deficient performance in allowing the damaging evidence to be admitted at trial. Reversal is required.

II. The evidence of felony murder was insufficient because, when the Legislature made first-degree child abuse a predicate felony for purposes of the felony-murder rule, it did not intend to turn every impulsive murder of a child by her parent or custodian into first-degree murder.

Issue Preservation and Standard of Review

Because insufficiency of evidence claims are reviewed de novo, the issue need not be raised at trial in order to preserve it for appellate review. *People v Patterson,* 428 Mich 502, 514; 410 NW2d 733, 738 (1987).

A claim of insufficient evidence is reviewed de novo. *People v McGhee,* 268 Mich App 600, 623; 709 NW2d 595, 612 (2005). The "court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *Jackson v Virginia,* 443 US 307; 99 S Ct 2781; 61 L Ed 2d 560 (1979); *People v Wolfe,* 440 Mich 508, 515; 489 NW2d 748, 751 (1992).

Discussion

The felony-murder part of the first-degree murder statute requires proof of a murder that occurred in the context of other dangerous criminal behavior; it does not raise the degree of murder according to the identity of the victim. The plain language of the statute supports this reading: it requires that the murder be committed while "in the perpetration of" another crime, language that does not readily apply to a murder and another crime that both arise from the same, single act. Moreover, the statutory scheme shows that the felony-murder rule applies only to "dangerous behavior" murders: when the Legislature has chosen to treat "special victim" murders

as first-degree murder, it has done so elsewhere within the statute, outside the felony-murder part of it.

In 1994, the Michigan Legislature amended the felony-murder statute to include first-degree child abuse as a predicate felony. Under the felony-murder statute, a person is guilty of first-degree murder if he commits a second-degree murder "in the perpetration of, or attempt to perpetrate," any of a list of predicate felonies.[6]

The issue here is whether a defendant can be said to have committed one crime while "in the perpetration of" another when the same act is the basis for both crimes. Here, both Counts 4 and 5 related to the death of Mr. Hampton's 13-month old daughter, Carmon. With respect to those charges, it was the prosecutor's theory that Mr. Hampton killed Carmon, who died of a single stab wound to the chest, while committing first-degree child abuse. (T I 167-168). The first-degree child abuse charges were based on that same act, a single stab wound. (T I 167-168).

Whether that act could be the basis for both the "felony" and the "murder" that led to his felony-murder conviction turns on the Legislature's intent when it added first-degree child abuse to the list of predicate felonies. The most important guide for determining legislative intent is the statutory language and how that language fits

[6] MCL 750.316(b) provides "Murder committed in the perpetration of, or attempt to perpetrate, arson, criminal sexual conduct in the first, second, or third degree, child abuse in the first degree, a major controlled substance offense, robbery, carjacking, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind, extortion, kidnapping, vulnerable adult abuse in the first or second degree under section 145n, torture under section 85, aggravated stalking under section 411i, or unlawful imprisonment under section 349b."

within the statutory scheme. As our Supreme Court explained in *Sun Valley Foods Co v Ward*, 460 Mich 230, 236-37 (1999), a court's

> primary task in construing a statute . . . is to discern and give effect to the intent of the Legislature. . . . This task begins by examining the language of the statute itself. The words of a statute provide `the most reliable evidence of intent' . . . .
>
> [W]e consider both the plain meaning of the critical word or phrase as well as `its placement and purpose in the statutory scheme.' . . ." (internal citations omitted).

Murder committed in the perpetration of * * *" does not plainly mean "murder for which the defendant would also be guilty of * * * ." At best, it is awkward to say a person committed one crime while "in the perpetration of" another when the act underlying each crime is the same. If, for example, a person shot and killed another, we would not normally say that he committed murder while "in the perpetration" of a felonious assault or an assault with intent to murder, though the one act could be the basis for all three charges.

Moreover, the statutory scheme strongly suggests that if the Legislature wanted to classify every murder of a child by her custodian as first-degree murder, it would not have chosen the felony-murder part of the statute as the place to do it. The first-degree murder statute singles out three kinds of murderers as especially deserving of condemnation: those who make a cool-headed, deliberate decision to kill (premeditation and deliberation, subd. [a]); those who murder while engaged in otherwise dangerous criminal behavior (felony murder, subd. [b]); and those who murder a special kind of victim (murder of on-duty peace or corrections officer, subd. [c]). Subsection (c), which raises the degree of murder because of the identity of the

victim, was added to the first-degree murder statute at the same time first-degree child abuse was added as a predicate felony to the felony-murder part of the statute. PA1994, No. 267, § 1. Had the Legislature meant to raise the degree of every murder of a child by her custodian—in other words, had the Legislature meant to create a new form of first-degree murder based on the identity of the victim and murderer—it undoubtedly would have chosen to do so in a subsection apart from the felony-murder rule, as it did with the police-officer-murder rule.

That the felony-murder part of the statute is reserved for murders that occur during otherwise dangerous criminal behavior is also apparent from context both within and without the statute. It is apparent from within because the felony-murder part of the statute lists a number of other predicate felonies, all of which require proof of criminal behavior apart from the act of murder itself: arson, first-, second-, or third-degree criminal sexual conduct, a major controlled substance offense, robbery, carjacking, breaking and entering of a dwelling, first- or second-degree home invasion, larceny, extortion, or kidnapping. See MCL 750.316. It is apparent from without because the traditional justification for the felony-murder rule is that certain felonies increase the risk that someone will die because they are inherently dangerous, and that the decision to undertake the inherently dangerous behavior is just as blameworthy as a decision to kill. See, eg, Perkins & Boyce, Criminal Law (3d ed, 1982), p 63. If the rule is changed to blur the distinction between the otherwise dangerous behavior and the killing that arises from it—if, in other words, the

dangerous context supposed to substitute for malice aforethought becomes the murderous act itself—then the rule is unmoored from its rationale.

Mr. Hampton acknowledges that the Court of Appeals addressed this issue, at least in part, in *People v Magyar*, 250 Mich App 480 (2002). In *Magyar*, this Court rejected Mr. Magyar's argument that his conviction for felony murder was improper because his murder and the predicate felony, which was also first-degree child abuse, arose out of the same act. *Id*. at 409. In reaching this conclusion, the Court acknowledged that Mr. Magyar was convicted of both second-degree and felony murder for his child's death.[7] As a result, the jury already "concluded that defendant acted with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with the knowledge that death or great bodily harm was the probable result." *Id*. at 412. No such finding was required here.

In addition, the Court also concluded that "because the jury found that defendant possessed both the malice to commit murder and the intent necessary to commit first-degree child abuse, defendant's argument is without merit." *Id*. at 413. Here, the jury was only required to find the intent required to satisfy first-degree child abuse. *Magyar* is, therefore, distinguishable. Mr. Hampton's felony murder conviction must be vacated.

[7] One count was based on the theory that the killing was premeditated and deliberated; the other on the theory that the murder occurred in the perpetration of a felony. The jury rejected the premeditation theory and convicted Mr. Magyar of second-degree murder, but accepted the felony-murder theory and convicted him on that count of first-degree murder.

This does not mean that the Legislature's addition of first-degree child-abuse as a felony-murder predicate felony is without effect. The child-abuse form of felony murder encompasses murders that culminate a course of abuse, as well as murders of someone other than the child-abuse victim.

What the rule does not contemplate is use of a single stab wound as the act underlying both the predicate felony and the murder itself. Because that was the theory by which Mr. Hampton was convicted of first-degree murder, his conviction must be vacated.

III. The trial court violated Mr. Hampton's right to Due Process when it denied his motion for a voluntary manslaughter instruction.

Issue Preservation and Standard of Review

Trial counsel made a motion for the jury to be instructed on voluntary manslaughter. (T V 146-148). The trial court denied his motion. (T V 148).

Claims of instructional error are reviewed de novo. *People v Mendoza*, 468 Mich 527, 533 (2003).

Discussion

The Due Process Clause of US Const, Am XIV requires the trial court to instruct the jury on every essential element of a charged offense. *Berrier v Egeler*, 583 F2d 515 (CA 6, 1978), cert den 439 US 955; 99 S Ct 354; 58 L Ed 2d 347 (1978). A defendant also has a due process right to present a recognized defense to a criminal charge. *See generally*, *Holmes v South Carolina*, 547 US 319; 126 S Ct 1727; 164 L Ed 2d 503 (2006). Our Supreme Court noted "[t]he instruction to the jury must include all elements of the crime charged, and must not exclude from jury consideration material issues, defenses or theories if there is evidence to support them." *People v Reed*, 393 Mich 342, 349-350; 224 NW2d 867 (1975) (internal citations omitted).

Manslaughter is a lesser included offense of murder. *People v Mendoza*, 468 Mich 527, 533; 664 NW2d 685 (2003). A homicide constitutes voluntary manslaughter instead of murder when the killing was accomplished without malice. *Id*. at 534.

If a "defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions" the killing constitutes voluntary manslaughter. *Id*.

at 535. "At the threshold of every manslaughter case, the killing, to be manslaughter and not murder, must have been the product of an act of passion; it must have been committed in a moment of frenzy or of temporary excitement." *People v Younger*, 380 Mich 678, 681; 158 NW2d 493 (1968); see also *People v Pouncey,* 437 Mich 382, 389; 471 NW2d 346 (1991) ("The provocation necessary to mitigate a homicide from murder to manslaughter is that which causes the defendant to act out of passion rather than reason.") A killing during a "sudden affray" presents a "real possibility" of a manslaughter verdict. *People v Woods*, 416 Mich 581, 625; 331 NW2d 707 (1982).

Here, a rational view of the evidence would have supported an instruction on voluntary manslaughter under the traditional heat of passion theory. The killing arose from a sudden fight between Mr. Hampton and Monique Rakowski. Mr. Hampton testified that during the fight Monique pulled a knife from under her pillow and started swinging it at him, hitting him on the left side of his chest. (T V 69). Monique tried to stabbing him again, but her hair was in her eyes and she missed Mr. Hampton and stabbed Carmon in the chest. (T V 70).

Upon seeing his daughter get stabbed, Mr. Hampton "lost it." (T V 71). He then chased her and tried to grab the knives out of her hands. (T V 71). Once he got the knives, Mr. Hampton "blacked out" and stabbed Monique between 14-16 times. (T V 72). Mr. Hampton repeated this same version of events to multiple witnesses at trial, including Detective Madonia, the officer-in-charge of the investigation. (T III 130; T IV 139-142; 159).

Under these facts, there was sufficient evidence for the jury to find that Mr. Hampton killed Monique while under the heat of passion, which resulted from adequate provocation, and that there was no lapse of time during which a reasonable person could have controlled his or her passions. There is at least a reasonable probability that the jury would have returned a voluntary manslaughter verdict if trial counsel had requested it. As a result, a new trial is required.

IV. Mr. Hampton's Due Process rights under the Fifth and Fourteenth Amendment were violated because he was improperly shackled at trial. Alternatively, trial counsel was ineffective for failing to object to Mr. Hampton's shackling.

Introduction

Mr. Hampton submits that he was denied his state and federal constitutional right to due process where he was visibly shackled for his trial. US Const, Ams V, XIV; Mich Const 1963, art 1, §17. Mr. Hampton was in leg shackles throughout the course of his trial. (T V 15-16, 108). Despite the fact that the issue of shackling was raised two times during the trial, (T V 15-16, 108), trial counsel never objected to the use of shackles and the trial court never justified the use of shackles during the proceedings. As a direct result of this Court and trial counsel's failure to address this issue, at least two of the jurors at Mr. Hampton's trial observed him wearing leg shackles during the course of the trial. (See Appendix B – Juror Postcards).

Issue Preservation and Standard of Review

Appellate counsel filed a motion for new trial during remand proceedings. The issue is therefore preserved. Preserved constitutional error requires this Court to reverse unless the prosecution can prove beyond a reasonable doubt that the error did not contribute to the verdict. *People v Carines*, 460 Mich 750, 774 (1999).

The question of whether defense counsel performed ineffectively is a mixed question of law and fact; this Court reviews for clear error the trial court's findings of fact and reviews de novo questions of constitutional law. *People v Trakhtenberg*, 493 Mich 38, 47 (2012).

The right to the effective assistance of counsel is well-established in Michigan and federal jurisprudence. US Const, Ams VI, XIV; *Strickland v Washington,* 466 US 668, 686 (1984); Const 1963, art 1, § 20; *People v Pickens,* 446 Mich 298, 310-311 (1994). To prevail on a claim of ineffective assistance of counsel, a criminal defendant must first show that "counsel's performance fell below an objective standard of reasonableness," and that the defendant was prejudiced as a result. *Wiggins v Smith,* 539 US 510, 521 (2003); *People v Armstrong*, 490 Mich 281, 289-290 (2011).

To establish prejudice, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 US at 694. A defendant need not show that counsel's error more likely than not affected the outcome. *Id.* The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome. A reasonable probability is sufficient to undermine confidence in the outcome. *Id.*

Argument

A. Mr. Hampton's Due Process rights under the Fifth and Fourteenth Amendment were violated because he was improperly shackled at trial.

The United States Supreme Court has expressly held that the "law has long forbidden routine use of visible shackles during the guilt phase [of a trial]." *Deck v Missouri,* 544 US 622, 626 (2005). Accordingly, the State may "shackle a criminal defendant only in the presence of a special need." *Id.* In this respect, "the Fifth and

Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." *Id.* at 629. Failure to do so violates the right to due process under the Fifth and Fourteenth Amendments of the U.S. Constitution, as well as the Michigan Constitution. *See Deck*, 544 US at 629; *People v Davenport,* 488 Mich at 1054 (2011); US Const, Amend V, XIV; Mich Const 1963, art 1, § 17.

Deck recognizes the legitimacy of security concerns, but the concerns cannot be generalized. They must exist in the particular case, apply specifically to the defendant on trial in that case and be articulated on the record. *Deck,* 544 US at 628-629. See also *People v Dunn,* 446 Mich 409, 425 (1994). Shackling is appropriate only in a narrow set of circumstances. As the Michigan Supreme Court has recognized, "a defendant may be shackled only on a finding supported by record evidence that this is necessary to prevent escape, injury to persons in the courtroom or to maintain order." *Dunn*, 446 Mich at 425; *see also Deck*, 544 US 622 at 628 (holding that shackling is only proper when required by "essential state interests such as physical security, escape prevention, or courtroom decorum").

The Supreme Court outlined three fundamental legal principles central to its holding in *Deck*. The first is the presumption of innocence. The Supreme Court concluded that shackling undermines that presumption, as well as the related fairness of the fact-finding process. Shackling undermines the presumption of innocence by "suggest[ing] to the jury that the justice system itself sees a need to

separate a defendant from the community at large." *Deck*, 544 US at 630 (internal quotation mark omitted). The second is the right to counsel. The Supreme Court concluded that shackling diminishes that right and may interfere with an accused's "ability to communicate" with his lawyer and with an accused's ability to participate in his own defense. The third is the need to maintain a dignified judicial process. The Supreme Court concluded that shackling constitutes an "affront" to the dignity of judicial proceedings. *Deck,* 544 US at 631; see also *People v Rose,* 289 Mich App 499, 517 (2010) citing *Estelle v Williams,* 425 US 501, 503 (1976).

Here, the trial court provided no justification for the shackling of Mr. Hampton at trial. Further, any precautions taken to obscure the shackles from view were obviously insufficient because at least one juror was able to observe Mr. Hampton in shackles during the course of the trial. The State must prove beyond a reasonable doubt that the shackling did not contribute to the verdict. This is particularly significant here because Mr. Hampton's defense depended entirely on whether the jury believed his version of events. Being viewed in shackles while he sat at counsel table and testified as to his version of events substantially undermined his ability to establish his defense. *Deck*, 544 US at 631.

Although Mr. Benicasa testified the shackling did not impact his determination of guilt, it clearly impacted his view of Mr. Hampton in general by further highlighting his incarceration and potential threat to security at trial. Indeed, Mr. Benicasa specifically testified he believed Mr. Hampton was shackled because he was a prisoner and for security reasons in the courtroom. (EH 13).

Furthermore, trial counsel and the trial court's post-hoc rationalization of the reasons supporting shackling are not sufficient. At the time of trial, there was simply no record to support shackling and the issue was never raised because trial counsel did not object. The same can be said of the precautions the court took to prevent the jurors from seeing Mr. Hampton's shackles. Those precautions were obviously insufficient because at least one juror was able to observe him in shackles at counsel table.

B. Counsel was ineffective for failing to object to the shackling of Mr. Hampton at trial

Trial counsel was also ineffective for failing to object to the use of shackles at trial. *Strickland*, supra. Counsel's failure to object to the shackling contributed to the critical gap in the record concerning the visibility of the shackling and abetted the trial court's denial of Mr. Hampton's due process rights. Trial counsel's failure to object to the shackling fell below an objective standard of reasonableness.

Indeed, in *Roche v Davis*, 291 F3d 473 (CA 7, 2002), the Seventh Circuit, on habeas review, addressed a situation similar to this case. There, the court held that counsel was ineffective in capital sentencing for the failure to object to the petitioner's shackling and the failure to ensure that the jury could not see the shackles. *Id* at 483-485. The state court decision was unreasonable because the court only considered counsel's efforts to reveal the shackles during his testimony but not when seated at the defense table when the record revealed the shackles were visible to the jurors. *Id*.

Similarly here, although trial counsel took some precautions to attempt to obscure Mr. Hampton's shackles from the view of the jury when he testified, those

precautions failed to hide the shackles from at least one juror. Indeed, Mr. Benicasa testified was able to view the shackles while Mr. Hampton when he was seated at counsel table. Counsel's failure to object and to ensure the necessary precautions were taken to make sure the jury could not observe the shackles was ineffective. *Roche*, 291 F3d at 483-485.

Summary and Request for Relief

WHEREFORE, for the foregoing reasons, Mr. Hampton asks that this Honorable Court grant his application for leave to appeal.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

/s/ Jason R. Eggert

BY:_____

Jason R. Eggert (P75452)
Assistant Defender
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

Dated: May 30, 2019